No. 80-1432

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# In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT KENNEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether a Drug Enforcement Agent and later the prosecutor abridged petitioner's Sixth Amendment right to counsel by conducting pre-indictment interviews with petitioner, where petitioner was admonished prior to each interview that he could have an attorney's help during questioning.

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on October 29, 1980 (Pet. App. A). A timely petition for rehearing was denied on December 23, 1980 (Pet. App. C). The petition for a writ of certiorari was filed on February 20, 1981. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 846, and of distributing, and possessing with intent

to distribute, one ounce of heroin, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to 15 months' imprisonment, to be followed by a three-year term of special parole. The court of appeals affirmed (Pet. App. A).

1. The evidence at trial showed that in early March 1979 Victor Herrera, a paid informant for the Drug Enforcement Administration, encountered petitioner at a Manhattan night club (Tr. 30).[1] Petitioner, who had known Herrera since 1974, asked him if he would be interested in engaging in some cocaine business. Thereafter, Herrera and petitioner went to petitioner's apartment, where Herrera told petitioner he was interested in heroin rather than cocaine. Petitioner stated that he had a potential heroin source and made an unsuccessful attempt to telephone his source (Tr. 22-24, 31-33). In the days that followed, petitioner introduced Herrera to his heroin source, Lincoln Stephens. Petitioner later gave Herrera a small sample of heroin, provided by Stephens, in exchange for $500 (Tr. 33-38). Petitioner and Herrera thereafter had a number of telephone conversations concerning arrangements for a larger sale of heroin (GX 11, 12, 13). These negotiations culminated in the basement of petitioner's apartment building with the sale by Stephens of one ounce of heroin to Herrera for $10,000 (Tr. 74-76, 223, 289-291, 345).

2. A complaint was filed and a warrant issued for petitioner's arrest on September 14, 1979 (Pet. App. D). Petitioner was arrested at his home on October 22, 1979. He was given his *Miranda* warnings, and he acknowledged that he understood them (S. 9-10). While being transported to the DEA office, petitioner told DEA agents that he was guilty

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[1] "Tr." references are to the transcript of the trial, held May 13-20, 1980; "S." references are to the transcript of the suppression hearing, held May 12-13, 1980. "GX" references are to Government Exhibits. "Tr." and "GX" references are based on those in the government's brief in the court of appeals.

of conspiracy but felt he was innocent of any sale of heroin. Petitioner stated that the heroin had come from Stephens, that Stephens' source was one "John" from Queens, and that he, petitioner, could introduce the agents to several drug dealers (S. 11). Petitioner was permitted to return home that night upon the understanding that he would return the next day for his initial appearance before a magistrate (S. 12; Tr. 492-495). The next morning petitioner met again with the agents and with an Assistant United States Attorney. He was again given *Miranda* warnings, and he again made essentially the same admissions.[2] At petitioner's request his initial appearance was delayed for two days to allow him to visit an elderly relative in Philadelphia (Tr. 495-496; S. 13-15).

Petitioner was indicted on February 14, 1980, together with his co-defendant Lincoln Stephens (Pet. App. E). Petitioner sought to suppress the statements of October 22 and October 23, 1979, in which he admitted to being guilty of conspiracy. The district court denied the motion (Pet. App. B), and the statements were introduced against him at trial.

## ARGUMENT

Petitioner contends (Pet. 12-23) that the district court erred in refusing to suppress his post-arrest statements because they were obtained in violation of his Sixth Amendment rights. In particular, he challenges the court of appeals' reliance on *United States* v. *Duvall*, 537 F. 2d 15 (2d Cir.), cert. denied, 426 U.S. 950 (1976), which holds that the Sixth Amendment right to the assistance of counsel

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[2]Petitioner was not unfamiliar with criminal procedure, having previously been arrested for armed robbery in 1945 and for bribery in 1975 (Tr. 544-545). Petitioner also acknowledged that he had learned that Herrera was an informant, and he was expecting to be arrested (S. 69, 82-83).

during any government interrogation, recognized in *Massiah* v. *United States*, 377 U.S. 201 (1964), does not automatically attach upon an individual's arrest pursuant to a warrant based on a criminal complaint issued under Fed. R. Crim. P. 3. For the reasons explained below (pages 4-7), this is not an appropriate case in which to consider the *Duvall* issue. In any event, we believe *Duvall* is correct, and it does not conflict with any holding of this Court or of any other court of appeals. Accordingly, review by this Court is unwarranted.

1. We note at the outset that, in the district court, petitioner did not base his motion for suppression of the statements here at issue on the Sixth Amendment. Rather, he argued that he had not understood the *Miranda* warnings and that the statements were coerced in violation of his rights under the Fifth Amendment (S. 6, 121-123). The Sixth Amendment was mentioned only as a basis for suppressing similar statements made two months later, which were not used at trial (S. 5-6, 63, 123, 131-132). Because the government and the district court thus were not on notice of the present Sixth Amendment claim, the government lacked a proper opportunity to introduce proof with respect to a waiver of Sixth Amendment rights and the district court had no occasion to rule on the waiver question. Since the facts underlying petitioner's Sixth Amendment claim were well known to him at the time of trial, his failure to assert the claim prior to or during trial would appear to bar its assertion on appeal. Fed. R. Crim. P. 12(f). While the court of appeals nevertheless considered and decided the Sixth Amendment issue (Pet. App. A), it relied on a ground that pretermitted any decision of the waiver question.

Notwithstanding the government's initial lack of notice concerning the Sixth Amendment issue now raised, the evidence introduced at the suppression hearing establishes that petitioner waived any Sixth Amendment rights he may

have had when he gave his statements to the DEA agent immediately following his arrest and, on the next day, to the prosecutor. DEA agent Sandler, whose testimony was credited by the district court (Pet. App. B), testified that he gave petitioner his *Miranda* warnings, including an assurance that petitioner could refuse to answer questions in the absence of counsel and could have an attorney appointed for him if he could not afford one (S. 10). Assistant United States Attorney Stuart Baskin, whose testimony was also credited by the district court (Pet. App. B), testified (S. 111, 116) that before beginning the interview he read petitioner a number of rights from a printed form (S. GX 1), pausing after each sentence to ask petitioner if he understood the statement and to note petitioner's response that he did. The statements read to petitioner included the following (S. 14; S. GX 1):

> You have a right to consult an attorney and to have that attorney present during this interview.
>
> * * * * *
>
> If you do not have funds to retain an attorney[,] an attorney will be appointed to represent you[,] and you do not have to answer any questions before this attorney is appointed and you can consult with him.
>
> * * * * *
>
> Would you like to answer some questions? You may pick and choose those questions you wish to answer and you may stop at any time.

Because petitioner wished to visit an elderly relative that evening in Philadelphia and thus did not wish to be delayed by an appearance before the magistrate, he signed a form titled "Waiver of Arraignment" (S. GX 2), which in three

separate places advised him of his right to counsel.[3] One sentence stated that "I understand I have a right to consult with counsel before signing this document waiving my rights." Another sentence, at the end, directly above the line for petitioner's signature, stated "I do not want a lawyer."

Petitioner contended, in connection with his Fifth Amendment claim, that his incriminating statements were coerced by suggestions that he would be held on high bail if he failed to cooperate. This claim was expressly rejected by the district court, which found nothing in the evidence "to support the argument of the defendant that he was coerced in order to obtain his cooperation or to pressure him into making some kind of confessions" or "to suggest that under the circumstances there would have been a high bail fixed, in fact, or that he would have had to remain in jail more than overnight" (Pet. App. B).[4]

This record shows " 'an intentional relinquishment or abandonment of a known right * * *' " to assistance of counsel (*Brewer* v. *Williams*, 430 U.S. 387, 404 (1977), quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)), on the part of petitioner, who was familiar with criminal procedures, having been twice previously convicted of serious crimes (see note 2, *supra*). It thus seems clear that petitioner's Sixth Amendment claim would have fared no better in

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[3]The term "Waiver of Arraignment" appears to be a misnomer. Arraignment is a proceeding at which a defendant pleads to an indictment or information. Fed. R. Crim. P. 10. The proceeding that occurs when a defendant is arrested, either without a warrant or with a warrant issued upon a complaint, is an "initial appearance" governed by Fed. R. Crim. P. 5, at which the arrestee is advised of his rights and an initial bail determination is made, but at which the arrestee is "not * * * called upon to plead."

[4]Petitioner's suggestion (Pet. 10) that AUSA Baskin had threatened to have him held on $150,000 bail is contradicted by Baskin's testimony (S. 109-110), which was credited by the district court (S. 129-130).

any other circuit than it did in the court below, regardless of whether other circuits would agree with *Duvall* regarding the point at which Sixth Amendment rights to counsel attach. See, *e.g.*, *United States* v. *Woods*, 613 F. 2d 629, 634 (6th Cir.), cert. denied, 446 U.S. 920 (1980); *Government of the Canal Zone* v. *Sierra*, 594 F. 2d 60, 67-68 (5th Cir. 1979); *United States* v. *Brown*, 569 F. 2d 236 (5th Cir. 1978) (en banc).[5]

2. For the reasons stated in the government's brief in opposition to the petition for certiorari in *Aiken* v. *United States*, cert. denied, No. 80-1096 (March 23, 1981) (Br. in Opp. 5-7), an arrest made pursuant to a warrant based upon a complaint under Fed. R. Crim. P. 3 does not mark the commencement of a criminal prosecution for the purpose of *Massiah* rights. *United States* v. *Duvall*, *supra*. (A copy of our *Aiken* brief has been provided to petitioner's counsel.)

We add only that *United States* v. *Zazzara*, 626 F. 2d 135, 138 (9th Cir. 1980), the sole court of appeals decision from another circuit cited by petitioner as contrary to *Duvall*, provides only dictum in support of petitioner's argument, since the *Zazzara* court found no violation of Sixth Amendment rights. We also note that this Court's decisions in *Brewer* v. *Williams*, 430 U.S. 387 (1977), and *Dillingham* v. *United States*, 423 U.S. 64 (1975), do not aid petitioner. In *Brewer*, the interrogation at issue was preceded by the defendant's arraignment, appointment of counsel for him, and an agreement between his counsel and the police that he

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[5]The waiver standard employed in these cases is less stringent than the standard for *post-indictment* waivers of the right to counsel established in *United States* v. *Mohabir*, 624 F. 2d 1140 (2d Cir. 1980). In *Mohabir* the court held, in the exercise of its supervisory power, that "a valid waiver of the Sixth Amendment right to have counsel present during post-indictment interrogation must be preceded by a federal judicial officer's explanation of the content and significance of this right." 624 F. 2d at 1153.

was not to be questioned in the absence of his lawyer. In *Dillingham*, the Court's reference to the arrest as the commencement of prosecution was a reference to an arrest immediately followed by the defendant's presentation before a magistrate for the setting of bail; as the briefs filed in that case indicate (Memorandum for the United States in Opposition at 2, No. 74-6738, 1975 Term), bail was set and the defendant, who had waived a preliminary hearing, was incarcerated for over a month before making bond. Thus, in a passage quoted from *United States* v. *Marion*, 404 U.S. 307, 320-321 (1971), the Court noted that " 'it is either a formal indictment or information or else the actual restraints imposed by arrest *and holding to answer a criminal charge* that engage the particular protections of the speedy trial provision of the Sixth Amendment.' " 423 U.S. at 65 (emphasis added). There is no suggestion that in *Dillingham* the Court was deciding the question whether an arrest pursuant to warrant based on a complaint, without more, would trigger Sixth Amendment rights, including any special rights under *Massiah* that exceed *Miranda* rights under the Fifth Amendment.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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